Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

GOMES, ET AL.,

Petitioners,

v.

WOOD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN C. RUSSELL
Counsel of Record

180 SOUTH 300 WEST #170
SALT LAKE CITY, UT 84101
(801) 532-5100
(801) 523-5178 FAX

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

On April 29th 2000, a social worker removed R.G. (nine months old at the time) from her home and from the custody of her parents without notice or hearing. R.G. was eventually returned to her parents and the juvenile court case was dismissed. The parents then sued in federal court under 42 USC § 1983 alleging the social worker had violated their Fourteenth Amendment right to the custody of their child when seizing R.G. without first providing notice and a hearing. The district court dismissed.

On appeal to the Tenth Circuit, all of the parties agreed that the law regarding the parents' right had been clearly established in April 2000, so the issue was not briefed. The Tenth Circuit, however, disagreed, holding that the law had not been clearly established with regard to the degree of certainty (reasonable suspicion or probable cause) a social worker was required to have that an emergency existed prior to seizing a child without notice or a hearing. The Tenth Circuit further held that a social worker only needed a *reasonable suspicion* that an emergency existed, despite the fact that the state statute required the social worker to have *substantial cause* to believe. In so holding, the Tenth Circuit affirmed the district court decision on different grounds, and on an issue which neither party had briefed. The holding is in conflict with other circuits. The questions presented are as follows:

1. Whether a state social worker need only have a reasonable suspicion—rather than probable cause—that emergency circumstances exist prior to seizing a child from the custody of her parents without notice or hearing.

2. Whether it is objectively reasonable to believe that an emergency exists when it is undisputed that a state social worker has time to obtain a warrant or other judicial order prior to seizing a child without notice or hearing.

3. Whether state child removal statutes—which require a social worker to have *substantial cause* to believe that an emergency exists prior to removing a child from the custody of her parents without notice and a hearing—provide fair warning and are controlling as to whether the social worker's conduct was objectively reasonable.

Rule 14.1(b) Statement

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Petitioners, Appellants, Plaintiffs: D.G., the father, S.G., the mother, and R.G. the child.

Respondents, Appellees, Defendants: Deborah Wood, Assistant Attorney General for the State of Utah, Division of Child and Family Services; Megan Annes, Tess Blackmer and Kerri Ketterer, Child Protection Workers for the Division of Child and Family Services.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners petition for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 452 F. 3rd 1122.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on June 27th 2006. Jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment to the Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Facts

On April 25th, 2000, R.G. fell from a bed at her home onto the floor landing on her head. S.G., R.G.'s mother, was in the room when she fell; but her back was turned and she did not see R.G. fall. R.G.'s grandmother, B.D., was present and saw R.G. fall off the bed.

On April 26 2000, S.G. brought R.G. to see Dr. Knorr. Upon Examination Dr. Knorr determined that R.G. had a small fracture on her skull. The fracture was linear, not star shaped, suggesting that the fracture was the result of a blunt trauma, which, according to Dr. Knorr, is more consistent with a fall on a flat object, rather than a blow to the head with a pointed object. S.G. told Dr. Knorr that R.G. had fallen off of her bed and hit her head on the floor. It was Dr. Knorr's opinion that her explanation for the injury was possible, but suspicious.

Because of criminal penalties for failure to report suspicious injuries to the Division of Child and Family Service (DCFS), Dr. Knorr told S.G. that, although he was comfortable sending the child home with her, he needed to report the incident. S.G. was not opposed to this at all, and understood his position. On April 26th 2000, promptly following his discussion with S.G., Dr. Knorr reported the injury to DCFS, by phone. He informed the case worker that, although the injury could have occurred in the manner S.G. described, it was suspicious, and he felt obligated to report it. He also told the case worker that he was comfortable leaving the child in her mother's care. The case worker told Dr. Knorr that, because it did not appear to be an

emergency, she would leave a note for the investigator, and that someone would be calling him back the next day.

On April 27th 2000, S.G. brought R.G. to see Dr. Knorr's partner for a follow up visit. Dr. Knorr was out of the office on April 27th, 2000, but his office did not hear from anyone from DCFS on April 27th, 2000.

On April 28th 2000, S.G. returned with R.G. for another follow up visit and asked Dr. Knorr if he had contacted DCFS, because they had not contacted her. Dr. Knorr told her he would follow up on it. R.G. was doing well and Dr. Knorr again felt comfortable leaving the child in her mother's care. He reassured S.G. that there would be an investigation and she was likely to be asked some routine questions. On April 28th 2000, Dr. Knorr spoke to Defendant Megan Annes, at DCFS. He told her about the injury. He told her that the mother's explanation for the injury was possible, but suspicious. He also told her that he felt comfortable leaving the child in her mother's care. Dr. Knorr also provided a written report to Defendant Annes which stated that there was "possible nonaccidental trauma."

Dr. Knorr was never highly suspicious that R.G. had been the victim of child abuse, and he never told anyone at DCFS, or anyone else, that he was highly suspicious that the child had been abused. In fact, at the later follow-up meeting with DCFS, Dr. Knorr stated that he reported this due to its suspicious nature and that he could not state that this was child abuse.

On April 28th 2000, Megan Annes consulted with Defendants Blackmer and Ketterer regarding the case. One option available to Defendants was to leave R.G. with her parents and assign a case worker to check up on them.

Defendants Annes, Blackmer and Ketterer decided not to offer in home services to the family. Defendants Blackmer and Ketterer advised Defendant Annes regarding the removal, and it was a joint decision to take R.G.

After speaking with Defendants Blackmer and Ketterer, and after deciding to take R.G., Defendant Annes spoke to Defendant Wood. Defendant Wood told Annes that she would support the decision to remove R.G. at the shelter hearing.

On Friday, April 28th 2000, after speaking to Defendant Wood, Annes then contacted Lieutenant Hales at the police station and proceeded to Petitioners' home at about 12:30 p.m. The parents and their child were not at home. Instead of attempting to obtain a warrant or court order for removal, Defendant Annes waited until the next day, Saturday, to take R.G.

On April 29th 2000, Defendant Annes returned to Petitioners' home. She inspected the floor where R.G. had fallen from the bed, and it was obvious to her that there was no padding between the thin layer of carpet and the concrete floor under the carpet.

While at the home, Petitioner D.G., R.G.'s father, asked Megan Annes to produce a warrant. Megan Annes told Domingos, "I don't have to. I have the authority." D.G. asked Megan Annes to investigate before taking R.G., and to speak with R.G.'s grandmother, who witnessed the fall, but Megan Annes refused. At the time Annes took R.G., there was no immediate threat to R.G.'s safety. Defendant Annes did not give any notice to the parents that she was coming to take R.G.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH THE SECOND, NINTH AND ELEVENTH CIRCUITS.

The Tenth Circuit holding conflicts with other circuits in two respects: (1) The Tenth Circuit holds that a social worker only needs *reasonable suspicion* that an emergency exists prior to seizing a child without notice or hearing. The Eleventh Circuit requires that a social worker have *probable cause* while the Ninth Circuit requires *reasonable cause*. (2) The Tenth Circuit holds that it may be reasonable to believe an emergency exists even when it is undisputed that the social worker has time to obtain a warrant or other judicial order prior to the seizure of the child. The Second Circuit disagrees holding that if there is time to obtain a warrant, then there can be no emergency. This conflict between the circuits creates confusion for social workers—exposing them to liability—and places the integrity of the family and the rights of parents at risk.

A. The Circuits disagree as to whether a social worker must have a reasonable suspicion or probable cause that an emergency exists prior to seizing a child from her parents without notice and hearing.

In this case, the Tenth Circuit held that a state social worker need only have a *reasonable suspicion* that emergency circumstances exist prior to taking a child from their parents without a hearing, *even if the social worker has time to obtain a warrant or court order* prior to the seizure of the child. Gomes v. Wood, --- F.3d ----, 2006 WL 1739586 at page 7 (10th Cir. 2006). The Tenth Circuit's opinion conflicts with

opinions from other circuit courts of appeal, and those circuit courts conflict with one another.

The Eleventh Circuit has held that a social worker must have *probable cause* that emergency circumstance exist prior to removing a child from their parents without a hearing. Doe v. Kearney, 329 F.3d 1286, 1295 (11th Cir.2003) ("a state may not remove a child from parental custody without judicial authorization unless there is probable cause to believe the child is threatened with imminent harm"). The Ninth Circuit has held that a social worker must meet a *reasonable cause* standard of certainty. Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir.2000) ("Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury"). The Tenth Circuit now holds in *Gomes v. Wood* that a social worker need only meet the reasonable suspicion standard. The result of the decision in the Tenth Circuit is that a state officer may seize a child on the basis of reasonable suspicion, but must have probable cause to seize the child's bicycle, as required by the Fourth Amendment.

B. The circuits disagree as to whether it is objectively reasonable to believe that an emergency exists when it is undisputed that a state social worker has time to obtain a warrant or other judicial order prior to seizing a child without notice or hearing.

The Circuit Court's of Appeals also disagree as to whether a social worker must obtain a judicial order or warrant, if time permits, prior to seizing a child without notice or

hearing. Here, the Tenth Circuit agrees with the Eleventh Circuit, while both disagree with the Second Circuit. The Second Circuit has held:

> While "there is a sufficient emergency to warrant officials' taking a [child into] custody without a prior hearing if [he or she] is immediately threatened with harm," [citation omitted] the converse is also true. If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, ex parte or otherwise, for the child's removal, then the circumstances are not emergent; there is no reason to excuse the absence of the judiciary's participation in depriving the parents of the care, custody and management of their child. If, irrespective of whether there is time to obtain a court order, all interventions are effected on an "emergency" basis without judicial process, pre-seizure procedural due process for the parents and their child evaporates.

Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999). The Tenth and the Eleventh Circuit's disagree with the Second Circuit's bright line test. Criticizing the Second Circuit, the Eleventh Circuit reasoned:

> As we have previously alluded to, due process is a flexible concept—particularly where the well-being of children is concerned—and deciding what process is due in any given case requires a careful balancing of the interests at stake, including the interests of parents, children, and the state. . . . This kind of subtle balancing cannot be properly accomplished when courts blunt the inquiry by simply asking whether there was time to get a warrant.

Kearney, at 1297-98. The Tenth Circuit, in Gomes, agrees with the above. Therefore, according to the Tenth and the Eleventh Circuit, even if a state officer has time to obtain a warrant or an ex parte order prior to seizing a child, it still might be reasonable to believe that an emergency exists.

The conflict between the Circuits is not only confusing, but it involves "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Resolving this conflict between the Circuits will not only eliminate the confusion between the Circuits, but will serve to protect the integrity of the family.

II. THE TENTH CIRCUIT COURT OF APPEALS' DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In this case, the Tenth Circuit Court of Appeals first held that the social workers had removed R.G. without a "reasonable and articulable suspicion" that she had been abused or was in imminent peril of abuse." *Gomes* at 1135. Next, the Court of Appeals held that the law was not clearly established in April 2000, that the social workers did not have *fair warning*, and that "a reasonable official *could have believed* that there was an immediate threat to R.G.'s safety." *Id.* at 1137. The holding is not only contradictory, but appears to adopt a standard of "could have believed" rather than "had a reasonable suspicion." But most troubling, the Court of Appeals failed to address the relevancy of the state child removal statutes which were in effect at the time the child was taken and which defined the appropriate standard of certainty as *substantial cause*.

In Hope v. Pelszer, 122 S.Ct. 2508 (2002), this Court held that even a regulation promulgated by a state agency could provide fair warning that a defendant's conduct violated the Constitution. Id. at 2517. The Court also held that "general statements of the law" are capable of "giving fair and clear warning," as well. In April 2002, when R.G. was taken from her parents, the Utah state removal statutes required that, prior to seizing a child without a warrant or hearing, the social worker must: (1) have *substantial cause* to believe that there was a substantial danger to the child. UCA §78-3a-301, (2) use the "least intrusive means available to protect the child . . ." UCA §62A-4a-201(3), and (3) "provide preventive, in-home services and family preservation services for families whose children are at immediate risk of being removed from the home." UCA §62A-4a-202(1)(a). The state statutory requirements in effect in April 2000, therefore, provided defendants with fair warning that they needed to have *substantial cause to believe* R.G. was in substantial danger, they were required to use the least restrictive means available to protect her, and they were required to provide preventative, in home services and family preservation services because R.G. was at risk of being removed from her home. The social workers did none of this, and the Court of Appeals failed to address any of it.
By holding that the social workers were entitled to qualified immunity, despite the standard enunciated by the state statutes, the Tenth Circuit has rendered all state removal statutes meaningless in so far as they attempt to provide a heightened degree of protection for parents.

CONCLUSION

The Tenth Circuit Court of Appeals opinion contradicts the opinions of the Eleventh, Ninth and Second circuits. And those circuits disagree with each other. The Tenth Circuit opinion now provides less protection for a child than for a child's bicycle. And the Tenth Circuit opinion ignores this Court's prior opinions regarding the effect of state law on the concept of fair warning and qualified immunity. The right at issue—the right to the care custody and control of ones children—is important to every parent and child in the nation. Therefore, Petitioners request that the Court grant its petition for writ of certiorari.

Dated this 20th day of September, 2006.

Respectfully submitted,

Steven C. Russell
Counsel of Record
180 South 300 West
170
Salt Lake City, UT 84010
(801) 532-5100

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 04-4197

[Filed June 27, 2006]

SHAUNA GOMES; DOMINGOS GOMES; and REBEKAH GOMES, Plaintiffs-Appellants,	)
v.	)
DEBORAH A. WOOD; MEGAN ANNES; KERRI KETTERER; and TESS BLACKMER, Defendants-Appellees.	)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 2:01-CV-735-PGC)

Before HENRY, McKAY, and TYMKOVICH, Circuit Judges.

OPINION

HENRY, Circuit Judge.

On April 30, 2000, Megan Annes, a child protection caseworker with the Utah Division of Child and Family Services, removed nine-month-old Rebekah Gomes from Rebekah's home and placed her in protective custody. Ms. Annes's decision was based on a four-inch linear skull fracture that Rebekah's treating physician had reported to Child and Family Services four days earlier. In September 2000, the Division of Child and Family Services found that protective custody was no longer warranted and returned Rebekah to her family.

Rebekah and her parents, Shauna and Domingo Gomes, then filed this 42 U.S.C. § 1983 action against Ms. Annes, Kerri Ketterer and Tess Blackmer (Ms. Annes's supervisors), and Assistant Attorney General Deborah Wood. The Gomeses alleged that the removal of Rebekah from their home without prior notice and a hearing violated their due process rights under the Fourteenth Amendment.

The district court granted summary judgment to all the defendants. Relying on *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), the court reasoned that the state's affording the Gomeses a post-removal hearing on May 3, 2000 foreclosed their claims for damages for failing to provide a pre-removal hearing. The court also indicated that "it likely would have reached the same result" on alternative grounds--that emergency circumstances justified removal without a hearing and that the defendants were entitled to qualified immunity. Aplts' App. at 941 (Dist. Ct. Order, filed July 16, 2004).

We disagree with the district court's application of *Carey* to these facts, but we affirm its decision for a different reason: we hold that because Ms. Annes did not violate clearly established law of which a reasonable official would have known, she and the other defendants are entitled to qualified immunity.

I. BACKGROUND

A. The Removal of Rebekah

On April 26, 2000, Shauna Gomes took Rebekah to her pediatrician, Dr. Brent Knorr. She told Dr. Knorr that Rebekah had injured her head on the previous day when she fell off the bed. She reported that Rebekah had slept a lot since the fall and was "cranky" and "clingy." Aplts' App. at 585.

Dr. Knorr examined Rebekah and found a large amount of swelling. An x- ray revealed a four-inch parietal fracture on Rebekah's skull. However, there was no depressed fracture—a significant finding because such fractures are more likely to injure the brain. The fracture was linear, not star-shaped, which suggested to Dr. Knorr that it had been caused by a blunt trauma.

Dr. Knorr found Ms. Gomes's explanation of the injury "possible but suspicious." *Id.* at 930. He stated that the shape of Rebekah's fracture was "consistent with a fall on a flat object." *Id.* at 929. However, in deposition testimony, he explained that he had seen many children who had fallen from beds, or objects of similar heights, but had not suffered the kind of fracture that he had seen on Rebekah. Dr. Knorr was also concerned that Ms. Gomes had waited until the day after Rebekah's injury to seek medical attention. To Dr. Knorr, the

delay in seeking care was "one of the warning signs that maybe something-wasn't on par with what I was told." *Id.* at 596.

Dr. Knorr prescribed Motrin. He told Ms. Gomes that he was required to report the fracture (and Ms. Gomes's explanation of it) to the Division of Child and Family Services. Nevertheless, he sent Rebekah home and told Ms. Gomes that he was comfortable doing so.

Dr. Knorr then reported the incident to Child and Family Services by telephone. The intake caseworker responded that, because the matter did not appear to be an emergency, an investigator would call him back on the following day.

On April 27, 2000, Ms. Gomes returned to the doctor's office with Rebekah. She was concerned that Rebekah had been vomiting. Dr. Knorr was out of the office, but his partner examined Rebekah and concluded that the vomiting was caused by the stomach flu and not by the head injury.

On April 28, 2000, Ms. Gomes again returned to Dr. Knorr's office for a follow-up visit. She asked him if he had contacted Child and Family Services, noting that no one had contacted her. Evidently, no one had contacted Dr. Knorr either, as he responded that he would follow up with the agency. He concluded that Rebekah was doing well, and he again "felt comfortable leaving the child in her mother's care." *Id.* at 930-31.

On the same day, Dr. Knorr spoke by telephone with the defendant Megan Annes, a caseworker in the Division of Child and Family Services. He told her that "the mother's explanation was possible but suspicious" but that he "felt

comfortable leaving [Rebekah] in her mother's care." *Id.* at 930.

After speaking with Dr. Knorr, Ms. Annes met with her supervisors, Tess Blackmer and Kerri Ketterer (who are also named as defendants in this case). They advised Ms. Annes that it might be necessary to take Rebekah into protective custody immediately—without first conducting a hearing. Ms. Blackmer indicated that "there were substantial reasons to believe that there was a substantial danger to Rebekah's physical health and safety." *Id.* at 550. Ms. Blackmer based that conclusion on the severity of Rebekah's skull fracture, Dr. Knorr's suspicions regarding Ms. Gomes's explanation of the fracture, the Gomeses' apparent delay in seeking medical treatment for the fracture, Rebekah's young age, and the possibility that further medical treatment for the skull fracture might be delayed. *Id.* Ms. Ketterer added that she did not find Ms. Gomes's explanation of Rebekah's injury to be credible. *See id.* at 556 (stating that "[b]ased on my training and experience . . . I did not believe it was possible for a nine-month-old child to receive a four-inch skull fracture from a two-foot fall off a bed because of the softness of a baby's skull bones"). Both supervisors advised Ms. Annes to investigate further and to seek legal advice.

Ms. Annes then telephoned the defendant Deborah Wood, an Assistant Attorney General for the State of Utah in the child services division (and the fourth defendant in this case). Ms. Wood also concluded that Rebekah's "physical health and safety were in substantial danger." *Id.* at 563. Ms. Wood and Ms. Annes agreed that Ms. Annes should conduct a home visit. Ms. Wood advised Ms. Annes that "if [Ms. Annes] concluded there was substantial cause to believe that placing Rebekah Gomes into protective custody was necessary to protect her from a substantial danger to her physical health

and safety, the decision would comply with the applicable state statutes." *Id.* at 564. Ms. Wood added that she would support the removal by filing a petition in the juvenile court seeking an out-of-home placement. *Id.*

On the following day, April 29, 2000, Ms. Annes contacted a police detective and proceeded with him to the Gomeses' home. They arrived at 12:30 p.m. but discovered that no one was there.

On April 30, 2000, Ms. Annes and another police officer returned to the Gomeses' home and interviewed them there. Ms. Annes asked how Rebekah had been injured. After Ms. Gomes offered the same explanation that she had given to Dr. Knorr, Ms. Annes inspected the bed and the floor where Ms. Gomes maintained that Rebekah had fallen. Her inspection confirmed her view that Ms. Gomes's explanation was not plausible. Ms. Annes was also concerned because Ms. Gomes told her that she had not noticed the fracture until the day after the fall. Accordingly, Ms. Annes decided to take Rebekah into protective custody and removed her from the Gomeses' home.

On May 3, 2000, Assistant Attorney General Wood filed a petition for custody in the Utah County Fourth District Juvenile Court. The petition recited the facts surrounding Rebekah's skull fracture, alleged that there was a substantial danger to Rebekah's health and safety, and requested the court to award custody to the Division of Child and Family Services for out-of-home care and placement. The court conducted a hearing on the same day. The Gomeses were represented by counsel, and they agreed that Rebekah could be placed in the temporary custody of the Division of Child and Family Services. Rebekah remained in state custody until September 2000, when the Division of Child and Family

Services determined that the circumstances warranted returning her to her family.

B. The Gomeses' Section 1983 Action

In September 2001, the Gomeses filed this 42 U.S.C. § 1983 action against Ms. Annes, Ms. Ketterer, Ms. Blackmer, and Ms. Wood. They asserted that taking Rebekah into state custody without prior notice and a hearing violated their due process rights under the Fourteenth Amendment, and they sought actual damages for this alleged constitutional violation.

The Gomeses and the defendant state officials each moved for summary judgment, and the district court granted summary judgment to all the defendants. The court reasoned that the state court's finding after a post-removal hearing that Rebekah should remain in state custody foreclosed the Gomeses' claim for damages arising out of failure to provide a pre-removal rehearing. According to the district court, "[t]he Supreme Court had made clear that where an adverse action would have nevertheless been taken had the plaintiff received adequate due process, the plaintiff would not be entitled to recover damages to compensate her for the adverse action." Aplts' App. at 939 (discussing *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)). "In such circumstances, 'the failure to accord procedural due process could not properly be viewed as the cause of the [adverse action]' and to 'award damages for injuries caused by [such action] would constitute a windfall, rather than compensation.'" *Id.* at 939-40 (quoting *Carey*, 435 U.S. at 260).

The district court also concluded that it would likely reach the same result on two alternative grounds. First, the court

stated, there were emergency circumstances posing an immediate threat to Rebekah's safety. As a result, the Due Process Clause of the Fourteenth Amendment did not require a pre-removal hearing. *Id.* at 941 & n.6 (citing *Roska v. Peterson*, 328 F.3d 1230, 1245 (10th Cir. 2003)).[1] Second, the court suggested that the defendants might be entitled to qualified immunity because they had relied on (a) a state statute, Utah Code Ann. § 64A-4a-202.1 (1998), that authorized removal without a hearing if there was a substantial danger to the physical health or safety of the child; and (b) the advice of Assistant Attorney General Wood.

II. DISCUSSION

On appeal, the Gomeses first argue that the district court erred in ruling that their claims were foreclosed by the state-court findings at the May 3, 2000 hearing that the removal of Rebekah was justified. They then contend that they were entitled to notice and a hearing before Rebekah was removed from their home on April 30, 2000, and that they should be allowed to recover damages for this violation of their due process rights.

In response, Ms. Annes, Ms. Ketterer, Ms. Blackmer, and Ms. Wood defend the district court's reliance on the state court's findings. They also argue that the district court's grant of summary judgment may be affirmed on the alternative ground that they are entitled to qualified immunity.

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[1] This court has issued three opinions in the cited case: *Roska v. Sneddon*, 437 F.3d 964 (10th Cir. 2006) (*Roska III*); *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003) (*Roska II*); and *Roska v. Peterson*, 304 F.3d 982 (10th Cir. 2002) (*Roska I*).

We review the district court's grant of summary judgment de novo, applying the same legal standards as employed by the district court. *B-S Steel Of Kan., Inc. v. Tex. Indus.*, 439 F.3d 653, 660 (10th Cir. 2006). We review the record in the light most favorable to the party opposing summary judgment. *Id.* When, as here, there are no genuine issues of material fact in dispute, we review the case to determine if the district court correctly applied the substantive law. *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 766 (10th Cir. 1999).

We begin by reviewing the requirements of the Due Process Clause when the state seeks to remove children from the home. Then, we proceed to the parties' arguments regarding the significance of the post-removal hearing and the defense of qualified immunity.

A. Removing Children from the Home in Emergency Circumstances

Under the Fourteenth Amendment to the United States Constitution, parents have a protected liberty interest in the care, custody and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). That interest is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Id.* (citing *Pierce v. Soc. of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)); *see also Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S. Ct. 1526, 32 L. Ed. 2d 15, (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring

American tradition."). As a result, state officials may not remove children from the home, through either temporary seizures or the permanent termination of parental rights, without providing due process of law. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Roska II*, 328 F.3d at 1245.

Nevertheless, the parents' liberty interest is not absolute. States have a *parens patriae* interest in preserving and promoting children's welfare, *Santosky*, 455 U.S. at 766, including "a 'traditional and transcendent' interest" in protecting children from abuse, *J.B. v. Washington County*, 127 F.3d 919, 927 (10th Cir. 1997) (quoting *Maryland v. Craig*, 497 U.S. 836, 855, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990)).

As a result, when a state agency seeks to remove children from the home, due process requires that the parents receive prior notice and a hearing, except in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Spielman v. Hildebrand*, 873 F.2d 1377, 1385 (10th Cir. 1989) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 848, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977)). These "extraordinary situations" include "[e]mergency circumstances which pose an immediate threat to the safety of a child." *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997). However, "the 'mere possibility' of danger is not enough to justify a removal without appropriate process." *Roska II*, 328 F.3d at 1245 (quoting *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999)).

Importantly, even when such a pre-hearing removal is justified, the state must act promptly to provide a post-removal hearing. *See K.D. v. County of Crow Wing*, 434

F.3d 1051, 1056 n.6 (8th Cir. 2006) ("Once a child is removed from parental custody without a court order, the state bears the burden to initiate prompt judicial proceedings to provide a post deprivation hearing."); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) ("[D]ue process guarantees that the post-deprivation judicial review of a child's removal be prompt and fair."); *Campbell v. Burt*, 141 F.3d 927, 929 (9th Cir. 1998) (stating that "[f]ederal procedural due process guarantees prompt post-deprivation judicial review in child custody cases"); *Weller v. Dep't of Soc. Servs. for Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990) ("[E]ven if it is constitutionally permissible to temporarily deprive a parent of the custody of a child in an emergency, the state has the burden to initiate prompt judicial proceedings to ratify its emergency action.").

Our cases have not offered a precise definition of "emergency circumstances which pose an immediate threat to the safety of a child." *Hollingsworth*, 110 F.3d at 739. However, in several instances we have concluded that the requisite emergency circumstances did not exist. Most recently, in *Roska II*, 328 F.3d at 1240, 1245-46, we held that the parents of a twelve-year-old boy who had been removed from their home without prior notice or a hearing had sufficiently alleged a violation of their due process rights. Despite evidence indicating that a mother might be suffering from Munchausen Syndrome by Proxy ("a disorder where an individual, usually a mother, inflicts physical harm upon a child to gain the sympathy and attention of medical personnel," *id.* at 1238), "[t]here was nothing particularly unusual about [the boy's] condition at the time he was removed," *id.* at 1241. Moreover, the boy's physician had stated that it would be a mistake to remove him from the home. We also observed that state officials had not even attempted to obtain an ex parte order authorizing the removal.

Accordingly, "no evidence indicate[d] that [the boy] was in immediate threat of death or severe physical harm." *Id.*; *see also Malik v. Arapahoe County Dep't of Social Servs.*, 191 F.3d 1306, 1315 (10th Cir. 1999) (finding no "extraordinary circumstance dangerous to the child" based on the uncle of a four-year-old girl having taken nude photographs of her during a visit five months before the removal); *Hollingsworth*, 110 F.3d at 739 (concluding that "the record contains no evidence that [the plaintiff] actually endangered the welfare of her children prior to their removal").[2]

Other courts have provided a somewhat more precise formulation of the standard required under the Due Process Clause to remove a child from the home without prior notice and a hearing. The First Circuit has concluded that a majority of circuits addressing this issue have held that "a case worker . . . may place a child in temporary custody when he has evidence giving rise to a reasonable and articulable suspicion that the child has been abused or is in imminent peril of abuse." *Hatch v. Dep't for Children, Youth, & Their Families*, 274 F.3d 12, 20 (1st Cir. 2001) (citing *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000)); *Croft*

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[2] At the time of Rebekah's removal, Utah law also addressed the state's responsibility to place children in protective custody. *See Roska III*, 437 F.3d at 971-72 (10th Cir. 2006) (discussing the Utah statutory scheme, particularly, Utah Code Ann. § 62A-4a-202.1, 202.2 (1998) and Utah Code Ann. § 78-3a-301 (1998)). As we note below, there are instances in which state officials' reliance on a state statute may constitute an extraordinary circumstance warranting qualified immunity even when the officials have violated clearly established federal law. *Roska II*, 328 F.3d at 1251. However, because we conclude that the defendants here did not violate clearly established federal law, we need not apply the Utah statutory scheme to resolve this case.

v. Westmoreland County Children & Youth Servs., 103 F.3d 1123, 1126 (3d Cir. 1997); *Gottlieb v. County of Orange*, 84 F.3d 511, 518 (2d Cir. 1996); and *Manzano, v. S.D. Dep't of Soc. Servs.*, 60 F.3d 505, 511 (8th Cir. 1995)); *see also Hatch*, 274 F.3d at 21-22 (adopting the reasonable suspicion standard); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1373 (8th Cir. 1996) (explaining the justification for the reasonable suspicion standard by stating that "[w]here a treating physician has clearly expressed his or her reasonable suspicion that life-threatening abuse is occurring in the home, the interest of the child (as shared by the state as *parens patriae*) in being removed from that home setting to a safe and neutral environment outweighs the parents' private interest in familial integrity as a matter of law").

The Ninth and Eleventh Circuits have formulated the standard somewhat differently, requiring reasonable or probable cause of imminent danger. *See Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (stating that "[o]fficials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury") (emphasis added); *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003) (indicating that "a state may not remove a child from parental custody without judicial authorization unless there is probable cause to believe the child is threatened with imminent harm") (emphasis added).

Notably, the Eleventh Circuit has indicated that this circuit has adopted the probable cause standard. *See Kearney*, 329 F.3d at 1295 (citing *Roska I*, 304 F.3d at 993). We do not read our *Roska* opinions in that way. In those opinions, we

stated that "the mere possibility of danger" does not justify a warrantless removal. *Roska II*, 328 F.3d at 1245; *Roska I*, 304 F.3d at 993 (internal quotation marks omitted). However, we added that "emergency circumstances which pose an immediate threat to the safety of a child" may do so. *Roska II*, 328 F.3d at 1245 (quoting *Hollingsworth*, 110 F.3d at 739); Roska I, 304 F.3d at 993 (quoting *Hollingsworth*, 110 F.3d at 739). We did not specify whether the state must have a reasonable suspicion of such circumstances or must establish probable cause that they exist.

In determining whether emergency circumstances exist, there is also some disagreement as to the significance of another matter—whether state officials lacked sufficient time to obtain judicial authorization for the removal without jeopardizing the safety of the child. The Second Circuit has reasoned that:

> While there is a sufficient emergency to warrant officials' taking a child into custody without a prior hearing if he or she is immediately threatened with harm, the converse is also true. If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise, for the child's removal, then the circumstances are not emergent; there is no reason to excuse the absence of the judiciary's participation in depriving the parents of the care, custody and management of their child. If, irrespective of whether there is time to obtain a court order, all interventions are effected on an emergency basis without judicial process, pre-seizure procedural due process for the parents and their child evaporates.

Tenenbaum, 193 F.3d at 594 (emphasis supplied) (internal citations and quotations omitted).

The Eleventh Circuit has criticized the Second Circuit's "sole focus [on] whether there is time to obtain a court order." *Kearney*, 329 F.3d at 1297. In the Eleventh Circuit's view, "due process is a flexible concept--particularly where the well-being of children is concerned--and deciding what process is due in any given case requires a careful balancing of the interests at stake, including the interests of parents, children, and the state." *Id.* "This kind of subtle balancing," the court reasoned, "cannot be properly accomplished when courts blunt the inquiry by simply asking whether there was time to get a warrant." *Id.* at 1297-98.

In our view, the reasonable suspicion standard appropriately balances the interests of the parents, the child, and the state. The failure to act when a child is in danger may have "unthinkable consequence[s]." *Jordan v. Jackson*, 15 F.3d 333, 350 (4th Cir. 1994). As a result, social workers should be afforded some discretion when they seek to protect a child whose safety may be at risk. *See Hatch*, 274 F.3d at 22; *Thomason*, 85 F.3d at 1373. Following the majority approach, we conclude that state officials may remove a child from the home without prior notice and a hearing when they have a reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there. We emphasize again that even in these instances in which emergency removal is justified, the state must afford the parents a prompt post-removal hearing. *See County of Crow Wing*, 434 F.3d at 1056 n.6; *Brokaw*, 235 F.3d at 1020; *Campbell*, 141 F.3d at 929; *Weller*, 901 F.2d at 396.

As to whether state officials have time to seek judicial authorization for the removal, we agree with the Eleventh

Circuit that this consideration should not be "the single focus" of the inquiry. *Kearney*, 329 F.3d at 1295. In many instances, it may not be entirely clear either how long it would take to obtain judicial approval or whether this period of delay would jeopardize the safety of the child. Nevertheless, we also agree with the Second Circuit's observation that, if we do not give any consideration to whether state officials might obtain judicial authorization of the removal without additional risk to the child, then the definition of an emergency may be broadened to such an extent that due process rights are eroded. *Tenenbaum*, 193 F.3d at 584.

Accordingly, we conclude that in determining whether state officials have a reasonable suspicion of an immediate threat to the safety of the child, we must consider "all relevant circumstances, including the state's reasonableness in responding to a perceived danger, as well as the objective nature, likelihood, and immediacy of danger to the child." *Kearney*, 329 F.3d at 1295 (emphasis added). Ordinarily, the question of whether state officials had time to seek and obtain judicial authorization for the removal without jeopardizing the safety of the child will be an important consideration, and the failure to establish that judicial authorization was impracticable will undermine the contention that emergency circumstances existed. However, neither this factor, nor any other single factor, is necessarily dispositive.

We now turn to the particular arguments raised by the parties in this appeal.

B. The Effect of the Post-Removal Hearing on the Gomeses' Claim for Damages

As we have noted, the district court concluded that it was not required to fully decide the issue of whether emergency

circumstances existed to justify Rebekah's removal. Aplts' App. at 942. The court did state that it believed "that the defendants have adequately established that Rebekah faced an immediate threat, especially in light of the state court's conclusion that she did." *Id.* at 941- 42.[3] However, the court concluded that the defendants were entitled to summary judgment on an alternative ground.

In particular, the court observed that the state had provided an adequate post-removal hearing and that the Gomeses did not challenge the state judge's decision that Rebekah remain in state custody. As a result, it concluded, the Gomeses could not prevail on their due process challenge to the pre-hearing removal. We agree with the Gomeses that the district court erred in relying on *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), for this conclusion.

In *Carey*, the Supreme Court held that when a procedural due process violation occurs and adverse action results, damages for injuries caused by the adverse action may not be recovered if the defendant can prove the action would have been taken even absent the violation. *See id.* at 260 (stating that "in such a case, the failure to accord procedural due process could not properly be viewed as the cause of the [adverse action]"). Significantly, however, the Court also concluded that a plaintiff may recover nominal damages and actual damages arising not from the deprivation of liberty or property but from the denial of procedural due process itself.

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[3] In the state court proceedings, the Gomeses stipulated that Rebekah could remain in temporary custody of the Division of Child and Family Services. The state court concluded that "[a]n emergency situation existed" and that "[t]he removal of the child was appropriate and necessary." Aplts' App. at 578.

As to the latter category of damages, the Court emphasized that the plaintiff is still required to prove causation:

> In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused.

Id. at 264; *see also McClure v. Ind. Sch. Dist. No. 16*, 228 F.3d 1205, 1214 (10th Cir. 2000) (stating that "[i]n a proper case, however, a plaintiff may recover such damages by 'producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself'" (quoting *Carey*, 435 U.S. at 263)).

Here, the Gomeses have not contested the state judge's finding that the removal of Rebekah was justified.[4] Moreover,

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[4] At oral argument, counsel for the defendant officials also suggested that the state court's findings at the post-removal hearing might bar the Gomeses' allegation in this § 1983 action that emergency circumstances justifying the removal did not exist. Counsel referred to the fact that the Gomeses had stipulated "that the prehearing requirements had been met and that [Rebekah] could remain in the temporary custody of [the Division of Child and Family Services]." Aplts' App. at 577. Moreover, counsel added, the state court's order also stated that "[a]n emergency situation existed" and that "the removal [of Rebekah] was appropriate and necessary" under the applicable Utah statute. *Id.* at 578.

Counsel for the Gomeses countered that, in light of the abbreviated nature of the post-removal hearing and the lack of

they have not sought nominal damages. Accordingly, they may only recover damages arising from the denial of due process itself. On this issue, the district court stated that "the only damage [the Gomeses] claim to have suffered is the emotional damage that resulted from [Rebekah's] removal." Aplts' App. at 940.

In our view, the district court read the Gomeses' allegations too narrowly. We acknowledge that the line drawn

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opportunity for discovery, the state court's findings should not be determinative in the instant action.

This argument involves principles of issue preclusion under Utah law. *See Career Serv. Review Bd. v. Utah Dep't of Corr.*, 942 P.2d 933, 938 (Utah 1997) (stating that "[f]our elements of issue preclusion are required for collateral estoppel: (1) The issue decided in the prior adjudication must be identical to the one presented in the action in question; (2) there must be a final judgment on the merits; (3) the party against whom the plea is asserted must be a party in privity with a party to the prior adjudication; and (4) the issue in the first action must be completely, fully, and fairly litigated"). The application of those principles to the state court's post-removal order appears to present some fairly close and difficult questions.

In any event, in neither the federal district court proceedings nor in this appeal did the defendants argue in their briefs that the state court order should be afforded preclusive effect in this action. We therefore decline to address the argument here. *See Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1547 (10th Cir. 1995) (holding that parties cannot raise arguments for the first time at oral argument).

Moreover, in light of our conclusion below that the defendant officials are entitled to qualified immunity, resolution of this issue is not necessary to the disposition of this appeal.

by the Supreme Court in Carey-between (a) damages arising from the deprivation of liberty or property and (b) damages arising from the denial of procedural due process itself-may be a fine one. Moreover, in many instances, plaintiffs may offer the same evidence to support both classes of damages claims.

Nevertheless, the Gomeses have alleged that they have suffered damages from the denial of procedural due process itself (and thus recoverable under *Carey*). In particular, Rebekah Gomes's mother, Shauna Gomes, answered a deposition question about the damages that she had suffered as follows:

> Q: Could you describe those [damages] for me, please. I understand you've talked about pain and anguish earlier, so is there anything in addition . . . that you've suffered?
>
> A: Yes. It's-I compare it to being attacked by a terrorist. I mean they come in and take something that is of most value to you, and I was able to get that thing back.
>
> However, it's always there. . . . I wonder when they're going to strike again. I wonder what could happen. I have no control over it, they could come at any time. It doesn't depend upon my actions.
>
> I've had dreams . . . from the trauma I went through, . . . when my child gets hurt with an accident or something, it just makes me sick to my stomach to have to take him in to the doctor. Who knows what might happen?

Aplts' App. at 783-84.

Viewing the record in the light most favorable to the Gomeses, this testimony concerns, in part, the manner in which Rebekah was removed (i.e., without prior notice and a hearing), and not merely the fact that she was removed. Ms. Gomes's statement that "they could come at any time" and her analogy to "being attacked by a terrorist" concern damages for the violation of procedural due process itself; her testimony addresses both the lack of notice and the randomness with which the Gomeses experienced the removal.

Accordingly, we conclude that the district court erred in ruling that the post-removal hearing and the findings by the state-court judge precluded the Gomeses from seeking damages for their due process claim.[5]

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[5] We emphasize that our application of *Carey* is based upon the damages alleged by the Gomeses. That is because both the defendants and the district court have incorrectly stated that the only damages the Gomeses have claimed are those resulting from the removal of Rebekah. *See* Aplts' App. at 519 (Mem. in Support of Defendant's Motion for Summary Judgment) (stating that "[i]t is undisputed that plaintiffs' alleged damages are emotional damages allegedly resulting from their not having their daughter with them" and that "[p]laintiffs have alleged no damages as a result of the alleged denial of procedural due process"); *id.* at 940 (Order Granting Defendants' Motion for Summary Judgment) (stating that "the only damage [the Gomeses] claim to have suffered is the emotional damage that resulted from [Rebekah's] removal"). As the deposition testimony quoted above clearly shows, the Gomeses' claim for damages should be read more broadly.

Whether this deposition testimony, combined with other evidence that the Gomeses might have offered, would be sufficient

C. Qualified Immunity

In light of its conclusion that *Carey* forecloses the Gomeses' claims for damages, the district court did not definitively resolve the merits of their due process claim. *See id.* at 942 (stating that "the court need not fully decide this issue"). However, in the district court proceedings and in this appeal, the defendant state officials have argued that they are entitled to summary judgment on the grounds of qualified immunity. They focus on the removal decision made by Ms. Annes, but they argue that because Ms. Annes is entitled to qualified immunity, the other defendants (who advised her regarding the removal decision) are also entitled to the same immunity. Upon de novo review of this legal question, *see Maldonado v. City of Altus*, 433 F.3d 1294, 1315 (10th Cir. 2006), we agree. *See id.* at 1302-03 (stating that "we have discretion to affirm on any ground adequately supported by the record so long as the parties have had a fair opportunity to address that ground") (internal quotation marks and citation omitted).

1. General Principles

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to support an award of compensatory damages is a question that we need not address here. Because the Gomeses have claimed damages for the violation of procedural due process itself, we proceed to the issue of qualified immunity and resolve the case on that basis. However, we note that, as a general rule, "a plaintiff's testimony, standing alone, may support a claim of emotional distress precipitated by a constitutional violation," but that "the case law [also] reveals that courts scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony." *Price v. City of Charlotte*, 93 F.3d 1241, 1251 (4th Cir. 1996).

Qualified immunity generally shields from liability for civil damages "government officials performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The Supreme Court has identified three purposes underlying this grant of immunity. First, qualified immunity "protect[s] the public from unwarranted timidity on the part of public officials." *Richardson v. McKnight*, 521 U.S. 399, 408, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997). Second, the doctrine helps "to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." *Id.* (internal quotation marks omitted). Third, qualified immunity reduces the chance that lawsuits will distract from the performance of public duties. The doctrine seeks to balance the protection of constitutional rights and the "substantial social costs" of imposing liability on public officials. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

In analyzing the qualified immunity defense, this court has adopted a three-part inquiry. First, we ask whether the plaintiffs' allegations, if true, establish a constitutional violation. *Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005). If the allegations do not meet that standard, we must dismiss the claim.

Second, if the plaintiffs have alleged a constitutional violation, we examine "whether the law was clearly established at the time the alleged violations occurred." *Roska II*, 328 F.3d at 1247. The law is clearly established if a reasonable official in the defendant's circumstances would understand that her conduct violated the plaintiff's constitutional right. *Moore v. Guthrie*, 438 F.3d 1036, 1042

(10th Cir. 2006). Recently, the Supreme Court has "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004) (discussing *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). Thus, government officials must make "reasonable applications of the prevailing law to their own circumstances," *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) (internal quotation marks omitted), and they "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. However, the defendant official may demonstrate that she "neither knew nor should have known of the relevant legal standard" because the law was not clearly established at the time she acted. *Harlow*, 457 U.S. at 819. If the law is not clearly established, we "do not require officials to anticipate its future developments." *Lawrence*, 406 F.3d at 1230.

Finally, if the law was clearly established, we proceed to the third part of the inquiry. We ask whether, in spite of the fact that the law was clearly established, "extraordinary circumstances"—such as reliance on the advice of counsel or on a statute—"so prevented [the official] from knowing that [her] actions were unconstitutional that [she] should not be imputed with knowledge of a clearly established right." *Roska II*, 328 F.3d at 1251 (internal quotation marks omitted). "[W]here the right is clearly established, a defendant should only rarely be able to succeed with a qualified immunity defense." *Id.* (internal quotation marks omitted).

2. Application

a. existence of a constitutional violation

We begin with the threshold inquiry of whether the Gomeses' allegations, if true, state a constitutional violation. Under the due process principles we have outlined, we must determine whether Ms Annes had a reasonable suspicion of "emergency circumstances which pose an immediate threat to the safety of a child," *Hollingsworth*, 110 F.3d at 739, when she removed Rebekah from the home. Because the defendant state officials raised the qualified immunity defense in their motion for summary judgment, we must view the evidence in the light most favorable to the Gomeses. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (noting that, under the first part of the qualified immunity inquiry, the question is whether "a violation could be made out on a favorable view of the parties' submissions"); *Simkins v. Bruce*, 406 F.3d 1239, 1241 (10th Cir. 2005) (stating that "[t]he threshold inquiry is whether the alleged facts (or, on summary judgment, the evidenced facts) taken in the light most favorable to the plaintiff show a constitutional violation").

Viewing the evidence in the light most favorable to them, genuine issues of material fact exist as to whether the defendants had reasonable suspicion to remove Rebekah before holding a hearing. First, although it was Rebekah's pediatrician, Dr. Knorr, who reported her injury to the Division of Child and Family Services, his testimony may be plausibly read to conclude that there was not an immediate threat to Rebekah's safety. In particular, Dr. Knorr stated that the shape of Rebekah's fracture was "consistent with a fall on a flat object," Aplts' App. at 929, and thus supported the Gomeses' statements that she had fallen onto the floor from a bed. Moreover, in his initial telephone call to the Division of Child and Family Services on April 26, 2000, and again in his second call to the agency on April 28, 2000, Dr. Knorr reported that he was "comfortable" allowing Ms. Gomes to

take Rebekah home. *Id.* at 930-31. Dr. Knorr added that "I never was highly suspicious that Rebekah had been the victim of child abuse, and I never told anyone at DCFS, or anyone else, that I was highly suspicious that the child had been abused." *Id.* at 931. That testimony is supported by the statement of the intake worker who answered Dr. Knorr's initial call and who told him that the circumstances did not sound like an emergency.

The Gomeses' own conduct also offers some support for their allegations. Ms. Gomes took Rebekah to the doctor on three successive days, and she now contends that these visits demonstrate that she was quite concerned about Rebekah's welfare. That behavior is at least arguably inconsistent with that of a neglectful or abusive parent. Moreover, during the appointment with Dr. Knorr on April 28, 2000, it was Ms. Gomes herself who informed him that she had not yet been contacted by the Division of Child and Family Services, thus leading him to call the agency a second time.

Thus, viewed in the light most favorable to the Gomeses, the record supports their contention that the defendant officials removed Rebekah without "reasonable and articulable suspicion that the child ha[d] been abused or [was] in imminent peril of abuse." *Hatch*, 274 F.3d at 20. We therefore proceed to the second part of the qualified immunity inquiry.

b. whether the defendants violated clearly established law

We consider whether a reasonable official in the defendants' circumstances would understand that his or her conduct violated the Gomeses' due process rights. *Moore*, 438 F.3d at 1042. "[T]he salient question . . . is whether the state

of the law [at the time of the incident] gave the [defendants] fair warning that their conduct was unconstitutional." *Hope*, 536 U.S. at 741. Officials who are mistaken about the lawfulness of their conduct may still be entitled to qualified immunity if the mistake is reasonable in light of the applicable law and the facts known to them at the time. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1300 (10th Cir. 2004).

We emphasize that when, as here, there is no dispute as to the material facts, the question is a legal one for the court to decide. As the Eighth Circuit has explained:

> [O]nce the predicate facts have been established, for the purposes of qualified immunity there is no such thing as a "genuine issue of fact" as to whether the officer "should have known" that his conduct violated constitutional rights. The conduct was either "reasonabl[e] under settled law in the circumstances," or it was not . . . .

Pace v. City of Des Moines, 201 F.3d 1050, 1056 (8th Cir. 2000) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (second brackets in original)); *see also Cortez v. McCauley*, 438 F.3d 980, 990-91 (10th Cir. 2006) (noting that when the parties agree on the "'what-happened' questions," the question of whether "a[] [reasonable] officer 'should have known' that his conduct violated constitutional rights" is one of law).

Moreover, "if officers of reasonable competence could disagree" about the lawfulness of the challenged conduct, then "[qualified] immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In those instances, the fact that the uncontroverted evidence supports opposite legal conclusions as to the reasonableness of an official's conduct demonstrates

that the official has not violated clearly established law. *See id.*; *see also Anderson*, 483 U.S. at 641 (stating that "[t]he relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the official's conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed") (emphasis added); *Cortez*, 438 F.3d at 990-91 (same); *Pueblo Neighborhood Health Ctrs., Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988) (same).

Here, in light of those principles, we must determine whether a reasonable official, presented with the relevant information regarding Rebekah's skull fracture in April 2000, would have understood that there were no "[e]mergency circumstances which pose an immediate threat to [her] safety," *Hollingsworth*, 110 F.3d at 739, and that, as a result, removing her from home without prior notice and a hearing violated the Gomeses' due process rights. Resolution of that question requires consideration of the case law in existence at that time.

As of April 2000, we had announced the emergency circumstances exception to the notice and hearing requirement, *see Hollingsworth*, 110 F.3d at 739, and we had had two occasions to apply that standard: in *Hollingsworth* itself and in *Malik*, 191 F.3d at 1315. However, in neither case was their any evidence whatsoever of an immediate threat. *See Malik*, 191 F.3d at 1315 (explaining that "[o]fficials' desire to circumvent an attorney's attempt to negotiate protective conditions for an interview does not rise to the level of an extraordinary circumstance dangerous to the child"); *Hollingsworth*, 110 F.3d at 739 (stating that "the record contains no evidence that [the plaintiff] actually endangered the welfare of her children prior to their removal"). Moreover, as of April 2000, we had not yet

identified as an important consideration the time available to state officials to seek and obtain judicial authorization for the removal without jeopardizing the safety of the child. Nor had we held that the reasonable suspicion standard applies to the determination of whether emergency circumstances exist. Additionally, we had stated that "considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse." *Washington County*, 127 F.3d at 925 (quotation marks omitted).

In applying that case law to the circumstances confronted by the defendants, we conclude that "officers of reasonable competence could disagree" as to whether there were emergency circumstances justifying the removal of Rebekah without a hearing. *Malley*, 475 U.S. at 341. In conducting the first step in the qualified immunity analysis (whether the Gomeses have alleged the violation of a constitutional right), we have set forth the evidence that supports their contention that emergency circumstances did not exist. However, other evidence supports the opposite conclusion.

In particular, Dr. Knorr informed Ms. Annes that Ms. Gomes's explanation of Rebekah's injury was "possible, but suspicious." Aplts' App. at 797. He added that he had seen many children who had fallen from beds or objects of similar heights but who had not suffered such a fracture. Dr. Knorr's suspicion was supported by Ms. Annes's inspection of the bed at the Gomeses' residence. Based on her inspection, she too thought it unlikely that Rebekah could have sustained her head injury from the reported fall. Dr. Knorr also expressed concern about the Gomeses' delay in seeking medical treatment. He explained that Rebekah's skull would have shown swelling and bruising within hours of the reported fall from the bed but that Ms. Gomes did not seek treatment until

the following day. Confronted with evidence of a significant head injury to an infant, a questionable explanation from the parents, and a delay in seeking medical treatment, a reasonable official could have believed that there was an immediate threat to Rebekah's safety.

That conclusion is supported by many reported decisions granting qualified immunity to state officials responsible for removing children from the home. *See, e.g, Berman v. Young*, 291 F.3d 976, 983-84 (7th Cir. 2002) (concluding that defendant state officials were entitled to qualified immunity when they removed a child from a home because they had a reasonable basis for believing that the child was being abused); *Hatch*, 274 F.3d at 25 (holding that, when (a) a nine-year-old boy asserted that he had been abused, (b) two school officials took the boy's claim seriously, and (c) a neutral physician reported that the boy's injuries were consistent with the claim of abuse, the defendant state official was entitled to qualified immunity because the official "had a reasonable basis both for suspecting child abuse and for believing [a child] to be in danger," and noting that "[t]he fact that this suspicion proved, in the long run, to be unfounded does not strip [the defendant] of his entitlement to qualified immunity"); *Foy v. Holston*, 94 F.3d 1528, 1536-37 (11th Cir. 1996) (holding that the defendant officials were entitled to qualified immunity when they placed a child in foster care because the child had alleged abuse by her parents, had bruises on her arm, stated that she did not wish to return to her parents, and threatened suicide and adding that immunity was not lost "even if the investigation and custody determination procedures were not textbook perfect") (internal quotation marks omitted); *Van Emrik v. Chemung County Dept. of Social Services*, 911 F.2d 863, 866 (2d Cir. 1990) (observing that "protective services caseworkers [must] choose between difficult alternatives" and that "[i]t is

precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision, whichever way they make it").

Although there are instances in which qualified immunity has been rejected, they generally involve circumstances in which "officers of reasonable competence," *Malley*, 475 U.S. at 341, would agree that an immediate threat to the safety of a child did not exist. *See, e.g, Wooley v. City of Baton Rouge*, 211 F.3d 913, 924 (5th Cir. 2000) (concluding that police officers who removed a child from the home were not entitled to qualified immunity because "[t]here is no indication in this record of any threat to [the child's] safety, nor were the officers investigating allegations that he previously had suffered abuse"); *Roska*, 328 F.3d at 1250 (concluding that because the child's health and safety "were not in immediate danger," "clearly established law put the defendants on notice that their conduct [removal without pre-deprivation procedures] violated the Constitution); *Malik*, 191 F.3d at 1314-15 & 1315 n.5 (affirming the district court's denial of qualified immunity based on the public officials' acknowledgment that the child was not in imminent danger of abuse).

Our holding is also supported by the policies underlying the qualified immunity doctrine. *See Richardson v. McKnight*, 521 U.S. 399, 408, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997) (observing that the doctrine protects the public from unwarranted timidity on the part of public officials, helps to ensure that talented candidates are not deterred from entering public service, and reduces the chance that lawsuits will distract from the performance of public duties). Here, as we have noted in discussing the grounds supporting the reasonable suspicion standard, "[s]ocial workers face extreme

difficulties in trying simultaneously to help preserve families and to serve the child's best interests." *Martinez v. Mafchir*, 35 F.3d 1486, 1490 (10th Cir. 1994). When confronted with evidence of child abuse, they may be required to make "on-the-spot judgments on the basis of limited and often conflicting information," *Hatch*, 274 F.3d at 22, with limited resources to assist them. They must balance the parents' interest in the care, custody and control of their children with the state's interest in protecting the children's welfare. Additionally, social workers must consider "the vital importance of curbing overzealous suspicion and intervention on the part of health care professional and government officials, particularly when such overzealousness may have the effect of discouraging parents or caretakers from communicating with doctors or seeking appropriate medical attention for children with real or potentially life-threatening conditions." *Thomason*, 85 F.3d at 1373. In the circumstances of this case, imposing the added burden of potential liability for damages under § 1983 would interfere unnecessarily with the performance of a difficult and essential job.

Accordingly, we conclude that the defendants Megan Annes, Kerri Ketterer, Tess Blackmer, and Deborah Wood are entitled to qualified immunity from the Gomeses' claim for damages under § 1983.[6]

III. CONCLUSION

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[6] In light of our holding, we do not consider the defendants' alternative arguments for qualified immunity—that they relied upon a state statute and advice of counsel. *See Roska II*, 328 F.3d at 1251, 1253 (noting that these "extraordinary circumstances" may support the defense of qualified immunity even if the defendants have violated clearly established law, but that they are "rare[]") (internal quotation marks omitted).

We therefore AFFIRM the district court's grant of summary judgment to the defendants.

APPENDIX B

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:01-CV-00735 PGC

[Filed July 16, 2004]

SHAUNA GOMES, DOMINGOS GOMES, REBEKAH GOMES, Plaintiffs,	)
v.	)
DEBORAH A. WOOD, MEGAN ANNES, KERRI KETTERER, TESS BLACKMER, Defendants.	)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This § 1983 action is before the court on cross motions for summary judgment. Plaintiffs Shauna and Domingos Gomes claim that the defendants, all state employees associated with the Department of Child and Family Services, violated their due process rights when they took Rebekah Gomes into

protective custody without a hearing. However, because Rebekah would have been taken into custody anyway, the Gomeses cannot prevail as a matter of law, and the defendants are entitled to summary judgment.

BACKGROUND

The salient facts in this case are not disputed. On April 25, 2000, nine-month-old Rebekah Gomes severely injured her head when she fell from a bed. The next day, plaintiff Shauna Gomes, Rebekah's mother, took Rebekah to see Dr. Knorr. Dr. Knorr discovered a small fracture on Rebekah's skull, and Mrs. Gomes explained that this injury must have happened when Rebekah fell off the bed. Dr. Knorr responded that her explanation was possible but suspicious. He told Mrs. Gomes that he would have to report the incident to DCFS but that he felt comfortable sending the child home with her.

At some point, defendant Megan Annes, a child protection caseworker with DCFS, was assigned to investigate Rebekah's situation. After reviewing the situation, Ms. Annes consulted with her supervisors (defendants Tess Blackmer and Kerri Ketterer) and a state attorney (defendant Assistant Attorney General Deborah Wood). All three codefendants agreed with Ms. Annes that under the circumstances, removal was probably necessary and could be done without a hearing, although the decision to remove Rebekah was not made until later. The final decision was saved until Ms. Annes could personally and fully assess the situation after visiting with Mr. and Mrs. Gomes.

On April 30, 2000, Ms. Annes met with Mr. and Mrs. Gomes at their residence. She was accompanied by a police officer. The suspicious circumstances were discussed with

Mr. and Mrs. Gomes. Following that discussion and unsatisfied with the explanations, Ms. Annes concluded that Rebekah should be removed immediately. Ms. Annes notified the plaintiffs that Rebekah would be taken into protective custody, although a hearing was not held prior to her removal that day.

May 3, 2000 – five calendar days later – Ms. Wood filed a Verified Petition for Custody in state court, and a shelter hearing was held in accordance with state law. The plaintiffs received notice of the hearing and were given an opportunity to be heard. They also were represented by counsel at the hearing and, through counsel, participated in the hearing. As a result of that hearing, Judge Sterling B. Sainsbury found that an emergency situation existed and that removal was appropriate and necessary under state law. Rebekah remained in protective custody until September 2000, when the parties reached a stipulated resolution.

ANALYSIS

A. Failure to Prove Causation

Because a post-removal hearing confirmed that Rebekah should be taken into protective custody, the plaintiffs cannot now claim that they were harmed by any due process violation that may have occurred.

The Tenth Circuit has held that "notice and a hearing are required before a child is removed except for extraordinary situations where some valid governmental interest is at stake

that justifies postponing the hearing until after the event."[1] "Valid governmental interests include emergency circumstances which pose an immediate threat to the safety of a child."[2] It is undisputed that Ms. Annes removed Rebekah without a hearing. Although the court believes that this removal may well not have violated the Fourteenth Amendment in light of the exigent circumstances, the court need not decide whether the circumstances allowed Rebekah's removal without a hearing because a post-removal hearing resulted in Rebekah's continued placement in protective custody.

The Supreme Court has made clear that where an adverse action would have nevertheless been taken had the plaintiff received adequate due process, the plaintiff would not be entitled to recover damages to compensate her for the adverse action.[3] In such circumstances, "the failure to accord procedural due process could not properly be viewed as the cause of the [adverse action]" and to "award damages for injuries caused by [such action] would constitute a windfall, rather than compensation."[4]

This precedent seems to resolve the matter at bar. The only alleged due process violation was that there was no pre-

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[1] *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1245 (10th Cir. 2003) (quoting *Spielman v. Hildebrand*, 873 F.2d 1377, 1385 (10th Cir. 1989)).

[2] *Id.* at 1245 (citing *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997)).

[3] *Carey v. Piphus*, 435 U.S. 247, 260 (1978).

[4] *Id.*

removal hearing, and the only damage plaintiffs claim to have suffered is the emotional damage that resulted from that removal. However, it is undisputed that after Rebekah's removal, a shelter hearing was held to determine her placement. At that time, a state judge concluded that she should remain in the custody of the state. Thus, had the plaintiffs been given the hearing they were constitutionally entitled to, Rebekah still would have been taken into protective custody, and the court cannot conclude that the alleged due process violation caused any injury to the plaintiffs. It does not matter that the shelter hearing was held on an accelerated schedule because nothing in the record indicates that a pre-deprivation hearing would have afforded more protections to the defendant. Moreover, the court concludes that the plaintiffs were given a meaningful opportunity to be heard at the shelter hearing. They had several days to prepare for the hearing, were fully aware of the underlying allegations, and participated through counsel.

The entirety of the plaintiffs' written response to this reasoning is captured in the following short paragraph:

> **REBEKAH WOULD NOT HAVE BEEN TAKEN FROM HER PARENTS BUT FOR DEFENDANTS' ILLEGAL SEIZURE**
>
> Defendants next argue that even had they not violated Plaintiffs' rights, the juvenile court would have taken Rebekah anyway, therefore, there are no damages. Defendants' Memorandum p. 25-26. The juvenile court case was eventually dismissed and Rebekah was eventually returned to her parents. Using Defendants' logic, the child should never have been taken in the first place and the entire sad affair was the result of Defendants' illegal conduct. The point of due

> process is to allow persons to have a meaningful hearing in a meaningful time. Taking a baby, accusing the parents of child abuse and then giving them 72 hours to get a lawyer and prepare for a shelter hearing is not a meaningful process. The eventual outcome of the juvenile court case – dismissal – is a more correct barometer for the truth that the shelter hearing order. Plaintiffs were damaged as a direct result of Defendants' conduct.[5]

This argument makes no challenge to the legal authorities relied on by the court. The only possible argument is that since Rebekah was ultimately returned to her parents' custody, the court cannot conclude that she would have been removed back in April 2000. This argument is hardly persuasive. As the defendants correctly note, the issue is what would have happened to Rebekah in April 2000. The fact that her parents were ultimately able to resolve any problems does not change the fact that at the time of the removal, removal was proper.

Finally, *Roska* does not speak to this issue. *Roska* does not discuss – much less decide – whether a post-deprivation hearing can defeat the eliminate of causation. The court has therefore proceeded to the decide the issue under the principles discussed above.

Accordingly, the court must conclude that the plaintiffs cannot prevail as a matter of law, so the court GRANTS the defendants' motion for summary judgment and DENIES the plaintiffs' motion for summary judgment.

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[5] Mem. in Opp. to Defs.' Mot. for Summ. Judgment (#86-1) at 26.

B. Failure to Establish a Fourteenth Amendment Violation

While the foregoing analysis is dispositive of the issues before the court, the court notes for the record that had it reached the constitutional issue, it likely would have reached the same result. As noted above, a hearing is not required where "emergency circumstances . . . pose an immediate threat to the safety of a child."[6] The court believes that the defendants have adequately established that Rebekah faced an immediate threat, especially in light of the state court's conclusion that she did.

Moreover, even if the threat did not warrant removal without a hearing under this standard, the court concludes that defendants have likely established the existence of extraordinary circumstances that, under *Roska*, justify the removal. Here, Ms. Annes decided to remove Rebekah under § 64A-4a-202.1, which expressly authorizes removal without a hearing.[7] The undisputed facts suggest that Ms. Annes complied with the statutory requirements of § 64A-4a-202.1. Plaintiffs do not contest that the statutes were actively applied in April 2000, and the court sees no reason for Ms. Annes to have concluded that these statutes were unconstitutional given the elaborate statutory scheme, which made removal without a hearing contingent on exigent circumstances and included a right to a rapid, post-removal hearing.

Moreover, Ms. Annes relied on the advice of Ms. Wood. It is undisputed that Ms. Annes gave a thorough description

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[6] *Roska*, 328 F.3d at 1245 (citing *Hollingsworth*, 110 F.3d at 739.

[7] Utah Code Ann. § 64A-4a-202.1; *see also Roska*, 328 F.3d at 1252.

of the facts and that Ms. Wood specifically advised her that the facts of this case met the statutory requirements. It is also undisputed that Ms. Wood worked in the Attorney General's office, a prominent post to be sure, and that Ms. Annes promptly acted upon Ms. Wood's advice.

These considerations further support the conclusion reached above, although the court need not fully decide this issue.

CONCLUSION

For these reasons, the court GRANTS defendants' motion for summary judgment (#78-1) and DENIES plaintiffs' motion (#82-1). In light of this conclusion, the court need not consider the merits of the defendants' motion to strike (#87-1).

The clerk is directed to close this case.

SO ORDERED.

DATED this 16th day of July, 2004.

BY THE COURT:

/s/

Paul G. Cassell
United States District Judge

Supreme Court, U.S.
FILED
OCT 25 2006
OFFICE OF THE CLERK

No. 06-422

In The

Supreme Court of the United States

SHAUNA GOMES, et al.,

Petitioners,

v.

DEBORAH A. WOOD, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

MARK L. SHURTLEFF
Utah Attorney General
J. CLIFFORD PETERSEN*
**Counsel of Record*
Assistant Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114
Telephone: (801) 366-0100

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Should this Court review Petitioners' challenge to the "reasonable suspicion" standard when the Tenth Circuit's application of that standard was not dispositive of the case?

2. Were Respondents given fair warning that their conduct was unconstitutional where the Tenth Circuit had not yet announced a standard for determining when state official's removal of a child from a parent's custody violates due process?

BRIEF IN OPPOSITION

Respondents Megan Annes, Kerri Ketterer, Tess Blackmer and Deborah A. Wood, submit this brief in opposition to a writ of certiorari to review the published opinion of the Tenth Circuit Court of Appeals in this case, *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006).

JURISDICTION

The Tenth Circuit issued its opinion on June 27, 2006. The Gomeses' petition for a writ of certiorari was timely filed on September 20, 2006.

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of facts in the opinion below. Based on these facts, the court of appeals affirmed the district court's grant of qualified immunity, but on different grounds. The court of appeals concluded that genuine issues of material fact regarding whether Respondents had reasonable suspicion that an emergency existed precluded qualified immunity under the first prong of the qualified immunity analysis, i.e., whether the facts established a constitutional violation. The court granted qualified immunity to Respondents under the second prong of the analysis, i.e., whether the relevant law was clearly established, because the court's prior decisions had not given Respondents fair warning that, under the circumstances here, removing the child from her parents' custody without a pre-deprivation hearing would violate the parents' rights.

REASONS TO DENY THE PETITION

I. The conflict among the circuits over the precise formulation of the Due Process standard used in determining whether a constitutional violation occurred is irrelevant to the ultimate outcome of this controversy

Petitioners' first two questions presented, dealing with the first prong of the qualified immunity analysis, do not cleanly present legal issues for this Court's review because Respondents prevailed on other grounds. Under this first prong, a court looks to "whether plaintiff's allegations, if true, establish a constitutional violation." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). To assess whether Respondents' conduct was a constitutional violation, the Tenth Circuit adopted a "reasonable suspicion" formulation of the Due Process standard. Under this standard, "state officials may remove a child from the home without prior notice and a hearing when they have reasonable suspicion of an immediate threat to the safety of the child if he or she is allowed to remain there." *Gomes*, 451 F.3d at 1130. Applying this standard, the Tenth Circuit determined that qualified immunity under the first prong of the analysis could not be granted because "genuine issues of material fact exist as to whether [Respondents] had reasonable suspicion." *Gomes* at 1135.

Due to these factual issues, the Tenth Circuit did not dispose of the case under the first prong of the qualified immunity analysis, but proceeded to the second prong, which requires a court to determine "whether the law clearly established that the [state officials'] conduct was unlawful in the circumstances of the case." *Saucier*, 533 U.S. at 201. The Tenth Circuit granted qualified immunity under this second prong because it had not yet announced, at the time of the

events in this case, the due process standard for emergency child removals without a pre-deprivation hearing. *Gomes* at 1137. Because the second prong was the dispositive issue here, the conflict among the circuits, which relates to what standard is used under the first prong, is irrelevant to the ultimate outcome of this case.

Moreover, the conflict among the circuits over the significance of whether state officials have time to get a warrant is not a well-developed conflict. Only the Second Circuit has focused solely on the availability of a warrant as the determinative factor in assessing whether an emergency exists, and that came in a 2-1 decision which did not address the approach taken by other circuits. *Tenenbaum v. Williams*, 193 F.3d 581, 594-96 (2d Cir. 1999). While three circuits have now squarely rejected the Second Circuit's approach, the Second Circuit has not considered the issue since the split in the circuits arose. *See Roe v. Texas Dep't of Protective and Regulatory Services*, 299 F.3d 395, 403-04 (5th Cir. 2002); *Gomes*, 451 F.3d at 1130; *Doe v. Kearney*, 329 F.3d 1286, 1297 (11th Cir. 2003). Due to this limited development, this Court should deny the petition and allow the circuits time to more fully explore the issue. Additionally, Petitioners failed to seek *en banc* review to allow the full Tenth Circuit to address the conflict.

II. The Tenth Circuit's determination that Respondents were not given fair warning that their conduct was unconstitutional does not conflict with this Court's decisions

The only issue raised in the petition relevant to the ultimate outcome of the case – whether the Tenth Circuit erred in concluding the law was not clearly established – presents no compelling reason for this Court to grant the

petition. Determining whether Respondents' conduct was unconstitutional required the court to apply its newly pronounced "reasonable suspicion" standard, but the inquiry into whether the law was clearly established looked not to the newly articulated standard, but to what legal guidance Respondents had been given *at the time of the conduct*. Because the Tenth Circuit had not announced the reasonable suspicion standard, had not identified the availability of obtaining a warrant as an important consideration, and had stated that "considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse," Respondents were not given fair warning that their conduct was unconstitutional. *Gomes*, 451 F.3d at 1136-37 (summarizing the Tenth Circuit's pronouncements on the governing Due Process standards for child removals) (citations omitted). The Tenth Circuit's pronouncements were so unclear that the Eleventh Circuit, in construing a Tenth Circuit decision issued two years after the events here, misapprehended what Due Process standard the Tenth Circuit had adopted. *Gomes* at 1129 (noting that Eleventh Circuit incorrectly read Tenth Circuit opinion as adopting probable cause standard). Where another circuit court could not correctly divine the standard, it would be unfair to require the Respondents to have anticipated what standard the Tenth Circuit eventually would adopt.

And contrary to Petitioners' assertion, the Tenth Circuit's "clearly established" analysis does not conflict with this Court's precedent. Petitioners' reliance on *Hope v. Pelzer*, 536 U.S. 730 (2002), is misplaced. That case addressed the effect of state statutes on the inquiry under the *third* prong of the qualified immunity analysis, not under the "clearly established" prong. Compliance with state law

only becomes relevant if a court reaches the third prong of the qualified immunity test, which the Tenth Circuit did not. *See Gomes* at 1138 n.6 (declining to address the third prong of the qualified immunity analysis since Respondents prevailed on the second prong). Moreover, the Tenth Circuit's decision does not render all state child removal statutes meaningless, as Petitioners contend. Rather, it correctly precludes a state law violation from automatically becoming a federal constitutional violation. The decision below does nothing to preclude a state actor from being held in violation of state law.

CONCLUSION

The petition for a writ of certiorari should be denied because the Tenth Circuit correctly determined the dispositive issue in this case – that Respondents were not given fair warning that their conduct was improper since the Tenth Circuit had not yet articulated the "reasonable suspicion" standard. Further, the petition should be denied because resolution of the conflict among the circuits on the Due Process standard is not relevant to the ultimate outcome of this case.

Respectfully submitted,

MARK L. SHURTLEFF
Utah Attorney General
J. CLIFFORD PETERSEN*
*Counsel of Record
Assistant Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114
Telephone: (801) 366-0100